Ann Joo Metal Sdn Bhd v Pembenaan MY Chahaya Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D3–28–1097 OF 1998
ABDUL WAHAB J
20 OCTOBER 1999

Companies and Corporations *— Winding up — Notice of demand — Notice and petition were served on respondent's registered address according to Registrar of Companies search — Oversight by registrar to update change of registered address — Whether service was defective — Whether defect was curable and could be remedied by court — Companies (Winding Up) Rules 1972 r 194*

Companies and Corporations *— Winding up — Petition under s 218 — Dispute as to amount of debt — Whether bona fide dispute*

The petitioner had issued a notice of demand under s 218 of the Companies Act 1965 ('the Act') to the respondent on 13 January 1998 claiming RM183,025.95. As no payment was made, the petitioner filed a petition on 21 December 1998. The petition was served by leaving it at the registered address at 56A, Jalan Burhanuddin Helmi, Taman Tun Dr Ismail, Kuala Lumpur based on the information supplied by the Registrar of Companies on a search made on 24 December 1997. The respondent challenged that the service of notice of demand was defective because the registered address of the respondent at that time was at Room 405, 4th Floor, Kompleks Selangor, Jalan Sultan, 50000 Kuala Lumpur as evidenced by the return pursuant to s 165 of the Act for the period up to 31 December 1996 and the amount in the notice was not accurate. The respondent further challenged that the service of the petition was also defective because it was not served upon the address shown in Form 44 of the Act which has changed the registered address to Suite 2–5–5, 5th Floor, Menara KLH Business Center, No 2, Jalan Kasipillay, 2½ Mile, Jalan Ipoh, 51200 Kuala Lumpur. The respondent again raised the issue of inaccurate amount, ie the petitioner has failed to take into account a payment of RM10,000 and the balance should be RM170,256.70. Henceforth, the issues before the court were: (i) whether service of the notice of demand and the petition was defective; (ii) if it was defective, whether the respondent has suffered substantial injustice which cannot be remedied by any order of the court; and (iii) whether a difference in the amount claimed vitiates the s 218 notice.

Held, allowing the petition:

(1) Notice of any change of registered address can only take effect when notification in Form 44 is being lodged with the Registrar of Companies. The respondent has exhibited a return pursuant to s 165 of the Act to evidence a change of registered address. It was not a Form 44 notice and cannot be accepted as a notice of change of registered address. In its second affidavit, the respondent

exhibited a notification in Form 44 filed on 28 August 1998. As from the date of filing of Form 44, the effective registered address of the respondent is Suite 2–5–5, 5th Floor, Menara KLH Business Center, No 2, Jalan Kasipillay, 2½ Mile, Jalan Ipoh, 51200 Kuala Lumpur. Henceforth, the petitioner was misinformed by oversight of the Registrar of Companies and has acted in accordance with the information provided by the registrar (see pp 713F, I–714A, 715D–E).

(2) However, the respondent has admitted in their affidavit that they have in fact received the notice of demand and the petition and as a result there was no injustice occasioned from the non-compliance of the requirement under the Act and the Companies (Winding Up) Rules 1972. The defect was curable under r 194 of the Companies (Winding Up) Rules 1972 (see pp 715E–G, 716A).

(3) The provisions as to service at the registered office cannot be intended as a shield for a company to plead that service was not made to its registered address as a defence when in fact it has received the notice and petition, and has not shown any prejudice in its defence not being served at its registered office (see p 716D–E).

(4) The court was not deciding in this petition whether the amount outstanding was RM183,025.95 or RM170,256.70. It should not be overlooked that the operative provision in winding up petition was s 218(1)(e) of the Act, and that s 218(2)(a) of the Act was only a deeming provision in winding up petition as to ability to pay debts. The respondent in disputing the amount claimed as due has not shown it was able to pay any lesser debt. A respondent was not protected from a winding up order under s 218 simply by purporting to dispute a sum claimed in notice of demand without substantiating that it was a bona fide or real dispute (see p 719C–E).

[Bahasa Malaysia summary

Pempetisyen telah mengeluarkan satu notis tuntutan di bawah s 218 Akta Syarikat 1965 ('Akta tersebut') kepada responden pada 13 Januari 1998 menuntut RM183,025.95. Memandangkan tiada bayaran telah dibuat, pempetisyen telah memfailkan satu petisyen pada 21 Disember 1998. Petisyen tersebut telah diserahkan dengan meninggalkannya di alamat berdaftar di 56A, Jalan Burhanuddin Helmi, Taman Tun Dr Ismail, Kuala Lumpur sebagaimana yang telah ditunjukkan pada maklumat yang diberikan oleh Pendaftar Syarikat dalam satu carian yang telah dibuat pada 24 Disember 1997. Responden telah mencabar bahawa serahan notis tuntutan tersebut adalah cacat kerana alamat berdaftar responden pada masa itu adalah di Bilik 405, Tingkat 4, Kompleks Selangor, Jalan Sultan, 50000 Kuala Lumpur sebagaimana yang dibuktikan melalui pemulangan (return) menurut s 165 Akta tersebut bagi tempoh sehingga

31 Disember 1996 dan jumlah di dalam notis tersebut adalah tidak tepat. Responden seterusnya mencabar bahawa serahan petisyen tersebut juga cacat kerana ia tidak diserahkan ke alamat yang ditunjukkan di dalam Borang 44 Akta tersebut yang telah menukarkan alamat berdaftar ke Suite 2–5–5, Tingkat 5, Menara KLH Business Center, No 2 Jalan Kasipillay, Batu $2^1/_2$, Jalan Ipoh, 51200 Kuala Lumpur. Responden sekali lagi menimbulkan isu jumlah tidak tepat, iaitu pempetisyen telah gagal untuk mengambil kira bayaran RM10,000 dan baki sepatutnya adalah RM170,256.70. Bermula dari situ, isu-isu untuk perhatian mahkamah adalah: (i) sama ada serahan notis tuntutan dan petisyen tersebut adalah cacat; (ii) jika ia cacat, sama ada responden telah mengalami ketidakadilan yang cukup besar yang tidak boleh diremedikan oleh apa-apa perintah mahkamah; dan (iii) sama ada perbezaan di dalam jumlah yang dituntut merosakkan notis s 218 tersebut.

Diputuskan, membenarkan petisyen tersebut:

(1) Notis tentang apa-apa penukaran alamat berdaftar hanya boleh berkesan apabila pemberitahuan dalam Borang 44 telah dimasukkan dengan Pendaftar Syarikat. Responden telah mengekshibitkan satu pemulangan menurut s 165 Akta tersebut bagi membuktikan satu penukaran alamat berdaftar. Ia bukanlah notis Borang 44 dan tidak boleh diterima sebagai satu notis penukaran alamat berdaftar. Di dalam afidavit keduanya, responden telah mengekshibitkan satu pemberitahuan dalam Borang 44 yang difailkan pada 28 Ogos 1998. Daripada tarikh pemfailan Borang 44 tersebut, alamat berdaftar responden yang berkuat kuasa adalah Suite 2–5–5, Tingkat 5, Menara KLH Business Center, No 2 Jalan Kasipillay, Batu $2^1/_2$, Jalan Ipoh, 51200 Kuala Lumpur. Bermula dari situ, pempetisyen telah diberikan maklumat yang salah disebabkan oleh kesilapan Pendaftar Syarikat dan telah bertindak menurut maklumat yang diberikan oleh pendaftar tersebut (lihat ms 713F, I–714A, 715D–E).

(2) Bagaimanapun, responden telah mengakui di dalam afidavit mereka bahawa mereka telah sebenarnya menerima notis tuntutan dan petisyen tersebut dan akibatnya tiada ketidakadilan yang timbul daripada ketidakpatuhan keperluan di bawah Akta tersebut dan Kaedah-Kaedah (Penggulungan) Syarikat 1972. Kecacatan tersebut boleh dipulihkan di bawah k 194 Kaedah-Kaedah (Penggulungan) Syarikat 1972 (lihat ms 715E–G, 716A).

(3) Peruntukan-peruntukan tentang serahan di pejabat berdaftar tersebut tidak boleh dimaksudkan sebagai satu pelindung kepada suatu syarikat untuk memohon bahawa serahan tidak dilakukan kepada alamat berdaftar sebagai satu pembelaan apabila pada hakikatnya ia telah menerima notis dan petisyen tersebut, dan tidak menunjukkan apa-apa prejudis di dalam pembelaannya di mana serahan tidah dilakukan di pejabat berdaftarnya (lihat ms 716D–E).

(4) Mahkamah tidak memutuskan di dalam petisyen ini sama ada jumlah baki adalah RM183,025.95 atau RM170,256.70. Ia tidak patut diabaikan bahawa peruntukan yang beroperasi di dalam petisyen penggulungan adalah s 218(1)(e) Akta tersebut, dan bahawa s 218(2)(a) Akta tersebut hanya satu peruntukan anggapan (deeming provision) di dalam petisyen penggulungan tentang keupayaan untuk membayar hutang. Responden di dalam mempertikaikan jumlah yang dituntut yang perlu dibayar tidak menunjukkan ia berupaya untuk membayar apa-apa hutang yang kurang. Seorang responden tidak dilindungi daripada satu perintah penggulungan di bawah s 218 hanya dengan mempertikaikan suatu jumlah yang dituntut di dalam notis tuntutan tanpa mengesahkan bahawa ia adalah satu pertikaian yang bona fide atau tulen (lihat ms 719C–E).]

Notes

For cases on notice of demand, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 786–787.

For cases on disputed debt, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 651–653.

Cases referred to

A Company, Re [1984] 1 WLR 1090 (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (refd)

Cymun Development Sdn Bhd v Supermax Sdn Bhd [1995] 2 MLJ 233 (refd)

Deputy Commissioner of Taxation v Cye International Pty Ltd (No 2) (1986) 10 ACLR 305 (refd)

Fimatic Engineering Sdn Bhd v Bumi Negeri Sdn Bhd [1995] 2 BLJ 121 (refd)

Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd [1990] 2 MLJ 46 (refd)

Ng Ah Kway v Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 (refd)

Perusahaan Jenwatt Sdn Bhd, Re [1990] 2 MLJ 178 (refd)

Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd [1998] 3 MLJ 810 (refd)

Processed Sand Pty Ltd v Thiess Contractors Pty Ltd [1983] 1 ACLC 1069 (refd)

PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd [1958] MLJ 113 (refd)

Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd [1985] 1 MLJ 68 (refd)

United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd (Mahkamah Persekutuan Rayuan Sivil 02–10–1995) (refd)

Yap Kim Kee, In the matter of Companies Winding Up No D4–42–242 of 1988 (unreported) (refd)

YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (Formerly known as Matang Factoring Sdn Bhd) [1996] 2 MLJ 482 (refd)

Legislation referred to

Australian Companies Act 1981 s 364(2)
Companies Act 1965 ss 11(5), 119, 120, 165, 218, 218(1)(e), 218(2)(a), Form 44
Companies (Winding Up) Rules 1972 rr 25, 194

SS Tieh (*SS Su* with him) (*Paul Ong & Associates*) for the petitioner.
Jakariya Abdul Jalil (*Blanche Kayveas & Co*) for the respondent.

Abdul Wahab J: Ann Joo Metal Sdn Bhd had issued a notice of demand under s 218 of the Companies Act 1965 to the respondent Pembenaan MY 1981 Chahaya Sdn Bhd on 13 January 1998. No payment having been made, the petitioner filed a petition on 21 December 1998. The petition was served by leaving it at the registered address shown on the information supplied by the Registrar of Companies on search made on 24 December 1997.

The service above was made at 56A Jalan Burhanuddin Helmi, Taman Tun Dr Ismail, Kuala Lumpur on 8 January 1999.

The respondent filed affidavits opposing the petition on 12 May 1999 ('the first affidavit') and on 31 May 1999 ('the second affidavit').

In the first affidavit the grounds were:

(1) That the notice of demand was served upon the address shown in the notice, which service was defective because the registered address of the Respondent at that time was no longer the address in the notice of demand, but Room 405, 4th Floor, Kompleks Selangor, Jalan Sultan, 50000 Kuala Lumpur as evidenced by the return pursuant to s 165 of the Companies Act 1965 for the period up to 31 December 1996.

(2) The amount in the notice is not accurate, and

(3) The notice of demand does not show how the sum was arrived at and in respect of what the amounts were for.

The second affidavit revised the objections as follows:

(1) The service of the petition on 13 January 1998 was defective because it was not served upon the address shown the copy of the notice in Form 44 of the Companies Act 1965. This notice in Form 44 is the notification of a further change of registered address filed on 28 October 1998 to Suite 2–5–5, 5th Floor, Menara KLH Business Center, No 2 Jalan Kasipillay, 2½ Mile, Jalan Ipoh, 51200 Kuala Lumpur; and

(2) that although payments were made by the respondent, they were not taken into account. The respondent exhibited a statement of account dated 31 December 1997 stating the outstanding balance to be RM170,256.70 after a payment of RM10,000 on 22 December 1997.

There are therefore two issues before the court:

(1) Whether service of the notice of demand and the petition is defective; and

(2) Whether a difference in the amount claimed vitiates the s 218 notice.

Service

Section 119 of the Companies Act requires a company to have a registered office within Malaysia to which all communications and notices may be addressed, s 120 provides for the registrar to be notified of the situation of registered office and of any change of the situation of such office within one month of the incorporation of the company or such change, as the case may be, and r 25 requires service upon the registered office of the company, or if there is no registered office, then at the principal or last known place of business by leaving a copy with any member, officer, or servant of the company, and if no such person can be found, then by leaving a copy at the registered office or principal place of business.

Section 120 of the Companies Act 1965 is as follows:

> Office hours
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> (1) Notice in the prescribed form of the situation of the registered office, the days and hours during which it is open and accessible to the public, and of any change therein shall be lodged with the registrar within one month after the date of incorporation or of any such change, as the case may be, but no notice of the days and hours during which the office is open and accessible to the public shall be required if the office is open for at least five hours during ordinary business hours on each day, Saturdays, weekly and public holidays excepted.

That notice of any change of registered address has to be lodged with the registrar within one month implies that a change may be effected prior to notification. If registration is to provide public notice of the change, then it must be that notice to the public is effective upon the notification in Form 44 being lodged. This view is supported by the Federal Court in *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* [1985] 1 MLJ 68:

> Mr Wong for the respondents maintains that the date of the lodgement of the s 120 notice to the registrar should be the effective date. We are inclined to agree with him. Whether the particulars are in due course (and as in this case very much later), entered into any register, is in our view irrelevant. Once the notice of change under s 120 has been lodged, anyone who wishes to ensure that a writ is served at the proper address can on payment of the prescribed fee avail himself of his right under s 11(2)(a) of the Act to 'inspect any document filed or lodged with the registrar'.

The respondent has exhibited a return pursuant to s 165 to evidence a change of registered address. It is not the Form 44 notice and cannot be accepted as a notice of change of registered address. The return pursuant to s 165 itself does not state when the change of address took effect. In its second affidavit the respondent exhibited a notification in Form 44 filed on 28 October 1998. As from the date of filing of the Form 44, the effective

registered address of the respondent is Suite 2–5–5, 5th Floor, Menara KLH Business Center, No 2 Jalan Kasipillay, 2½ Mile, Jalan Ipoh, 51200 Kuala Lumpur.

Rule 25 of the Companies (Winding Up) Rules 1972 makes the following provision in respect of service:

> Service of petition
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> (1) Every petition shall, unless presented by the company, be served upon the company at the registered office of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at the registered office or principal place of business, or by serving it on such member or members of the company as the court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator (if any) appointed for the purpose of winding up the affairs of the company. The affidavit of service of petition may be in Form 5 or 6.

Now, the petitioner had in fact sought from the registrar of companies and was advised that the address was 56A, Jalan Burhanuddin Helmi, Taman Tun Dr Ismail, Kuala Lumpur. It was argued s 11(5) of the Companies Act 1965 provides that an extract certified by the registrar of companies shall admissible in evidence as of equal validity as the original document, and therefore the address could be relied upon as the registered address. Upon consideration, the court is of the opinion that is not the issue, as is evident in the following case.

In *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd* [1958] MLJ 113, there was a similar error on the part of the registrar in overlooking a notice of change of address filed by Joo Seang & Co Ltd resulting in service against Joo Seang & Co Ltd being sent to the wrong address. Rigby J held that: (i) where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, and the court would set aside a judgment obtained by default where the requirements have not been complied with; and (ii) in this case as the company had not been served with the writ of summons at its registered office, the purported service was therefore bad and all proceedings thereafter were bad and the judgment obtained in default of appearance was accordingly a nullity.

In *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* (Mahkamah Persekutuan Rayuan Sivil 02–10–1995) the Federal Court affirmed its previous decision in *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* [1985] 1 MLJ 68 that the change of the registered address took effect from the date of notification to the Registrar. It also applied *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd.*

Neither *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd, Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* nor *United Malayan*

Banking Corp Bhd v Richland Trade & Development Sdn Bhd are of much assistance to this case. In *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd*, as a result of the wrong address, Joo Seang & Co Ltd in fact never received the writ, as evidenced by the affidavit of the managing director that he had no knowledge of the existence of the suit until he was served with a copy of the judgment obtained in default of appearance. For that reason of non-receipt the judgment in default was set aside. In *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* the appellants, having left a copy of the writ at No 42–2A which was no longer the registered address, and no appearance having been entered by the respondents, had moved the court for and entered judgment in default for the amount claimed. Execution proceedings then followed and land belonging to the respondent company was attached. It was then, according to respondents, that they came to know of the writ. They then took out a summons to set aside the writ on the grounds that they had not been served. The Federal Court agreed. In *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* the Federal Court on a surprising development on the fact that there was no evidence that the registered office of the respondent had been moved to that of its company secretary at 731, Dato Keramat Road, Penang that it therefore remained as the original address at 48, Serangoon Road, Penang, and the service to that address was therefore valid.

The petitioner requesting a search has been misinformed by oversight of the Registrar of Companies, and has acted as per the information provided by the registrar, that is a fitting case for consideration of the application of r 194 which provides:

> Formal defect not to invalidate proceedings
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> (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.

The question to be considered is whether the respondent has suffered substantial injustice which cannot be remedied by any order of the court.

In this case before me, the respondent did in fact receive the petition and affidavit verifying the petition. Indeed there is no denial that the respondent had received the notice of demand pursuant to s 218. The notice of demand exhibited by the respondent shows a notation it was received on 15 January 1999 at 4.15pm, that is, the second day after it was left at 56A, Jalan Burhanuddun Helmi address. The Jalan Burhanuddun Helmi address is in fact the business address of the respondent. The respondent itself was confused by the actual registered address of the respondent as at 13 January 1999 since the original objections contained in the first affidavit asserted the proper address was Room 405, 4th Floor, Kompleks Selangor, Jalan Sultan, 50000 Kuala Lumpur, when according to the notification in Form 44 filed on 28 October 1998 with the Registrar of Companies, and produced in its second affidavit, the registered address of the Respondent is Suite 2–5–5, 5th Floor, Menara KLH Business Center, No 2 Jalan Kasipillay, 2½ Mile, Jalan Ipoh, 51200 Kuala Lumpur.

Since the notice of demand and the petition together with the affidavit verifying the petition has in fact been served at the principal place of business as stated in the respondent's own return under s 165, and admitted in the respondent's third affidavit filed on 23 June 1999, and since it is nowhere pleaded that any of the documents were never received and the notation 1999, there is no injustice occassioned and the cases *PT Pelajaran Nasional Indonesia v Joo Seang & Co, Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* are distinguishable on this ground. Other than raising the technicality, the respondent's affidavits has not shown any injustice to have been occassioned. In *Cymun Development Sdn Bhd v Supermax Sdn Bhd* [1995] 2 MLJ 233, a notice of demand was sent to the business address, but was received by the respondent, who had made appearance to defend the petition. In *Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd* [1998] 3 MLJ 810, a similar view was also adopted, following the decision in *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* [1990] 2 MLJ 46 where Abu Mansor J (as he then was) held that minor irregularities, in other words those that do not cause substantial injustice incapable of being remedied by any order or court, would not invalidate a notice of demand. It was held there was no injustice to render the notice of demand to be bad in law. In my view the provisions as to service at the registered office cannot be intended as a shield for a company to plead that service was not made to its registered address as a defence when in fact it has received the notice and petition, and has not shown any prejudice in its defence not being served at its registered office.

Amount in the s 218 notice

The amount stated in the notice of demand under s 218 is RM183,025.95. Exhibit LPH-2 the second affidavit, is a statement of account ending 31 December 1997 recording an initial balance of RM180,256.70, a payment of RM10,000 leaving a balance of RM170,256.70. This discrepancy was objected to and the respondent sought to establish there was a dispute as to the amount.

Section 218 provides:

> (1) The court may order the winding up if:
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> (e) the company is unable to pay its debts; ... .

The said section defined inability to pay debts in sub-s (2):

> (2) A company shall be deemed to be unable to pay its debts if:
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> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; ... .

There are ample authorities that the elements of s 218(2)(a) must be complied with strictly. In *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986]

A 1 MLJ 58, Shanker J held that, 'A petition for winding up of a company is a serious matter as it affects the reputation of the company'. His Lordship Zakaria Yatim J's judgment in *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 in which Zakaria Yatim J (as he then was) held, inter alia, that the notice of demand must comply strictly with the requirements of s 218(2)(a) of the Companies Act 1965 was cited with approval by his B Lordship Gunn Chit Tuan SCJ (as he then was) in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313. In *Re Perusahaan Jenwatt Sdn Bhd*, Zakaria Yatim J (as he then was) said:

> In the present case, the notice of demand has not complied strictly with the requirements of s 218(2)(a). Since the amount stated in the said notice is far C in excess of the debt due, failure on the part of the company to pay the sum claimed does not follow that the company is unable to pay its debt under the section. The notice of demand is therefore bad and the court cannot presume that the company is unable to pay its debt.

The reasoning in *Re Perusahaan Jenwatt Sdn Bhd* relied on Australian and D English cases as follows:

Firstly, in *Processed Sand Pty Ltd v Thiess Contractors Pty Ltd* [1983] 1 ACLC 1069, s 364(2) of the Australian Companies Act was given a literal interpretation. Waddell J in his judgment in that case said:

> ... But there are, in my opinion, much stronger considerations which indicate E that the provision should be given a literal interpretation. Its effect is to provide a statutory admission that a company is unable to pay its debts. One would except such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability. It would seem arbitrary F and unjust to create an admission arising on failure to pay ... a debt, a part of which was not due.

I agree with the passage quoted above. In my view, s 218(2)(a) of our Act should be given a literal interpretation. This view is consistent with what I have earlier in another case viz that the notice of demand must comply strictly with the requirements of s 218(2)(a) . See *In the matter of Yap Kim* G *Kee*, Companies Winding Up No D4–42–242 of 1988 (unreported).

Secondly, *Processed Sand Pty Ltd v Cye International Pty Ltd* and *Deputy Commissioner of Taxation v Cye International Pty Ltd (No 2)* (1986) 10 ACLR 305, appear to be consistent with decision of the court in England in *Re A Company* [1984] 1 WLR 1090. In that case, Mervyn Davies J in his H judgment at p 1095 said:

> When the demand was made, the amount due to the petitioner was not known to the company ... At the time of the demand the company knew there was a dispute and were willing to pay £2,234.38 but that is not to say that they knew that the sum due was £2,234.38. They knew that the petitioner was alleging the sum due to be £12,435.75. As to the petitioner, it knew that the company I were disputing liability in that sum. In these circumstances I do not see how the petitioner was in any position to make a genuine demand for a specified sum. Section 223(a) comtemplates a creditor being able to point to a debt of a specified sum that cannot be seriously questioned either as to existence or

> quantum. It follows that the petitioner was not at liberty to make use of s 223(a) ... I am satisfied that the statutory demand ought not to have been served... .

The criteria then is that there must be a real dispute. In *Re Perusahaan Jenwatt Sdn Bhd* the petitioner had claimed RM295,584.46 in the notice of demand. In the affidavit in support of the application, the managing director of the company averred, inter alia that in para 6 of the petition, the petitioning creditor stated that the indebtedness of the company was in the sum of RM29,548.46. That there is a real dispute is undoubted.

If there is a real dispute, it ought to be determined an a suit for the debt and not by way of a winding up petition. In *Fimatic Engineering Sdn Bhd v Bumi Negeri Sdn Bhd* [1995] 2 BLJ 121, Low Hop Bing JC (as he then was), using the terminology of 'bona fide dispute' held:

> A debt, which is disputed bona fide, must be proved in a civil court. It is not the function of the winding up court to resolve debts which are bona fide disputed. Again, in *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd,* Shanker J held that, 'The petition for winding up cannot be resorted to settle disputed debts. The proper course for the petitioner is to file a civil suit for determining the disputed claims'.
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> In *Salak Park Development Sdn Bhd* [1994] 3 AMR 2554, after holding that there was a substantial bona fide dispute as to the alleged debt, and after reviewing the abundant line of authorities, I dismissed the petitioner's petition for winding up. I hereby adopt and apply the same principle as I have done in my earlier decision above.

In reply the petitioner had explained how the sum of RM183,025.95 had been arrived at. It had produced exh 'C' through the affidavit of one Lim Sin Seong, being the same statement but including four interest payments of RM2553.85, which brought the total to the amount demanded. It was asserted these details had been given to the respondent. The four interest payments correspond to four months overdue in payment and calculated at the rate of 1.5% per month. It is clear from the third affidavit that the issue raised is whether the sum due is RM183,025.95 or RM170,256.70. An interest of 1.5% is stated in invoices as being due on overdue accounts as exhibited in the petitioner's third affidavit in reply. It was agreed to in the terms and conditions of contract. The respondent's fourth affidavit made a general denial but did not deal specifically with the documents produced by the petitioner. I conclude in the circumstances there is no real or bona fide dispute.

Whether the outstanding sum is RM183,025.95 or RM170,256.70 it is well beyond the RM500 in s 218(2)(a). In *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447, there was a claim for RM127,159. The respondent admitted in affidavit that it owed RM60,580. The court allowed the winding up, holding:

> ... In our judgment, as the debt of RM60,580 is not disputed the respondent company is caught under s 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the

appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it. If an order of winding up is made the respondent company can still defend on the balance amount in dispute. Under the Act the liquidator may defend any action or other legal proceedings in the name and on behalf of the company which has been ordered to be wound up. The Act also provides for the fixing of dates on which creditors are to prove their debts or claims against the company. Even where the whole amount of debt claimed is disputed the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

The court is not deciding in this petition whether the amount outstanding is RM183,025.95 or RM170,256.70. The respondent is not prevented from challenging the amount before the liquidator. It should not be overlooked that the operative provision in the winding up petition is s 218(1)(e), and that s 218(2)(a) is only a deeming provision as to ability to pay debts. The respondent in disputing the amount claimed as due, has not shown it is able to pay any lesser debt. In as much as a party owing a debt is not excused from making payment merely because it made a proposal to pay or that its proposal is not accepted, a respondent is not protected from a winding up order under s 218 simply by purporting to dispute a sum claimed in a notice of demand without substantiating that it is a bona fide or real dispute.

The respondent had not denied receipt of the notice of demand, left at it business premises on 13 January 1999 and bearing a notation of receipt on 15 January 1999. It had not disputed the amount. When the petition and its verifying affidavit was served at its business premises, it filed its affidavit of objection. Its first objection, as dealt with above, is purely technical, alleging its registered office was at Room 405, 4th Floor, Kompleks Selangor, Jalan Sultan, 50000 Kuala Lumpur. Later the respondent filed its second affidavit where the Form 44 exhibited showed another address, to wit, Suite 2–5–5, 5th Floor, Menara KLH Business Center, No 2 Jalan Kasipillay, 2½ Mile, Jalan Ipoh, 51200 Kuala Lumpur, without any explanation as to the earlier address alleged. Only then it alleged a statement of account showed the sum to be RM170,256.70. The petitioner gave a plain and clear explanation. The respondent denied the interest charges in its third affidavit as unauthorized. The petitioner produced invoices and terms and conditions of agreement substantiating the interest charges added on to the RM170,256.70. Instead of substantiating that there is a real or bona fide dispute, the respondent in its fourth affidavit now claims that the sum due on 20 May 1997 was RM200,719.33 and that it had made a proposal to pay RM20,000 in July, August and September and thereafter RM40,000 per month until full settlement.

In my mind, the proposal was incomplete as it specifically stated that the amount and mode of payment of overdue interest shall be the subject of further discussion. As a proposal that was not accepted, the proposal is irrelevant to the matter at hand, for which the petitioner has substantiated

his claim each time new question was raised by the respondent. No assertion was made that any payment was made pursuant to the proposal. The statement of account produced by the respondent only showed a payment of RM10,000 on 22 December 1997, and not RM40,000. A party owing a debt is not excused from making payment merely because it made a proposal to pay or that its proposal is not accepted.

It is evident that the objections shifted focus as they are answered by the petitioner, and are clearly of a nature that, if brought to a civil court, would have been dealt with summarily as a plain and obvious case. It would not have justified a trial. As such it does not warrant a dismissal of the petition as in *Fimatic Engineering Sdn Bhd v Bumi Negeri Sdn Bhd* [1995] 2 MLJ 121.

It was held in *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84 as follows:

> It is not the neglect to meet the demand of the creditor that gives the jurisdiction to the court to order that the company be wound up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that gives the court the jurisdiction. This presumption is rebuttable.

A similar approach was taken in *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (Formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 (CA), where it was held that an objection based on the failure to quantify the interest on a principal amount could not be sustained. The substantive matter to be considered is the capability of the appellant in paying its debts.

In all of the circumstances, I have no doubt that there is no merit in fact in the objections raised by the respondent as to the existence of a real or bona fide dispute as to warrant dismissal of this winding up petition. There is no evidence before this court that could rebut the reasonable presumption in the circumstances, that the respondent is unable to pay its debts.

The petition was therefore granted.

Petition allowed.

Reported by Ng Kian Pin